IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-653

ALLIED-GENERAL NUCLEAR SERVICES, et al., *Petitioners*

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., et al.

No. 76-762

COMMONWEALTH EDISON COMPANY, et al., *Petitioners*

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., et al.

No. 76-769

WESTINGHOUSE ELECTRIC CORPORATION, *Petitioner*

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., et al.

No. 76-774

BALTIMORE GAS AND ELECTRIC COMPANY, et al., *Petitioners*

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., et al.

BRIEF FOR RESPONDENTS NATURAL RESOURCES DEFENSE COUNCIL, INC., et al. IN OPPOSITION

ANTHONY Z. ROISMAN
ROISMAN, KESSLER & CASHDAN
1025 15th Street, N.W.
Washington, D.C. 20005
Attorney for Respondents Natural Resources Defense Council, Inc., et al.

ROSS SANDLER
Attorney for Respondents Natural Resources Defense Council, Inc., et al.

Mailing Address:
NATURAL RESOURCES DEFENSE COUNCIL, INC.
15 West 44th Street
New York, New York 10036

MARCH 9, 1977

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

CITATIONS

CASES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-653

ALLIED-GENERAL NUCLEAR SERVICES, et al., *Petitioners*

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., et al.

No. 76-762

COMMONWEALTH EDISON COMPANY, et al., *Petitioners*

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., et al.

No. 76-769

WESTINGHOUSE ELECTRIC CORPORATION, *Petitioner*

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., et al.

No. 76-774

BALTIMORE GAS AND ELECTRIC COMPANY, et al., *Petitioners*

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., et al.

BRIEF FOR RESPONDENTS NATURAL RESOURCES DEFENSE COUNCIL, INC., et al. IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 539 F.2d 824 and is set forth in the Appendix to the

petition in No. 76-653 at pages A-34[1] *et seq.* The Court of Appeals supplemental opinion denying rehearing is not yet reported and is set forth at A-74 *et seq.* and the order denying the suggestion for rehearing *in banc* is set forth at A-80.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petitions.

QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly found error in the Nuclear Regulatory Commission's ("Commission") conclusion that decisions on applications to build and operate commercial-scale plutonium recycle facilities and to use, transport and export plutonium fuel could be made prior to completion of the generic and programmatic environmental review being prepared pursuant to the National Environmental Policy Act ("NEPA") which is intended to determine whether commercial-scale recycle and plutonium fuel use, transport and export should be allowed.

2. Whether the Court of Appeals correctly found error in the Commission's conclusion that decisions on applications to build and operate commercial-scale plutonium recycle facilities and to use, transport and export plutonium fuel could be made on the basis of individual impact statements pursuant to NEPA which excluded from consideration all issues being examined in the Commission's generic and programmatic environmental review of the wisdom of plutonium recycle and plutonium fuel use, transport and export.

[1] References preceded by the letter "A" are to the Appendix in petition No. 76-653. Reference to "Jt. App." are to the Joint Appendix filed in the Court of Appeals.

STATUTES INVOLVED[2]

28 U.S.C. § 2342 (1970 & Supp. V 1975) (Administrative Orders Review Act)

42 U.S.C. § 2331 (1970) (Section 181 of the Atomic Energy Act of 1954)

42 U.S.C. § 2239 (1970) (Section 189 of the Atomic Energy Act of 1954)

42 U.S.C. § 4332 (1970 & Supp. V 1975) (Section 102 of the National Environmental Policy Act of 1969)

42 U.S.C. §§ 2133 and 2201(b) (1970) (Sections 103 and 161b, respectively, of the Atomic Energy Act of 1954)

COUNTER-STATEMENT OF THE CASE

This is a NEPA case which raises no issues of novelty or of first impression. The Court of Appeals found that by rule the Commission sought to circumvent its own established NEPA procedures to allow the commercial introduction of a controversial and potentially dangerous new technology, plutonium recycle. The Court of Appeals declared that rule unlawful under NEPA because it allowed commercialization of the new technology *prior* to completion of the associated environmental impact statement. The Court of Appeals remanded the case for further Commission proceedings consistent with the opinion. A-79. As such, the case is not worthy of certiorari because it only applied settled NEPA law in a manner consistent with the Court's opinions construing that Act.

[2] The statutes involved are set forth on pp. 4-5 of the Petition and pages A-81 to A-84 of the Appendix in No. 76-762.

A. The Plutonium Hazard

During operation nuclear power reactors produce as by-product moderate amounts of plutonium. A typical large reactor produces about 200 to 250 kilograms of plutonium each year. Since much of this plutonium is easily fissioned, it can be used as reactor fuel. "Plutonium recycle" is the nuclear industry's proposal (1) to recover the plutonium produced in today's reactors by separating it from the radioactive waste products produced by the reactors and (2) to recycle this plutonium as fuel back into these reactors.

Plutonium itself is virtually unknown in nature; the entire present-day inventory is man-made, produced in nuclear reactors. Plutonium-239, the principal isotope of the element, has a half-life of 24,000 years, hence its radioactivity is undiminished within human time scales. It is one of the most deadly substances known. One millionth of a gram has been shown capable of producing cancer in animals.

Plutonium is the material from which nuclear weapons are made. An amount the size of a softball (about 10 kilograms) is enough for a nuclear explosive capable of mass destruction. Scientists now widely recognize that the design and manufacture of a crude nuclear bomb is no longer a difficult task technically, the only serious obstacle being the availability of the plutonium itself. Plutonium found in spent reactor fuel is not readily available for weapons because of the highly penetrating radiation in the associated reactor waste products. As a component of waste products it is virtually immune from theft. But once plutonium has

been reprocessed, it becomes far easier to handle and theft becomes a serious problem.[3]

Because of the relationship between plutonium recycle and the availability of plutonium for weapons, there exists substantial opinion that the use of plutonium as reactor fuel greatly escalates the risk of nuclear energy production. For instance, a statement signed by sixteen Nobel Laureates and twenty-six members of the National Academy of Sciences concluded as follows:

> We believe that the proposed 'plutonium economy' is morally indefensible and technically objectionable. At many stages in the nuclear fuel cycle—including reactor operation, fuel transport, reprocessing, fabrication and waste management—opportunity exists for catastrophic releases of plutonium and other radioactive materials through accident or malice. . . . We fear that the cumulative effect of these imperfections may well be unprecedented and irremediable disaster.
>
> In a plutonium economy, moreover, nuclear theft and terrorism, weapons proliferation to both national and subnational groups, and the development of a plutonium black market seem inevitable. None of these problems will respect national boundaries, and the difficulties of international cooperation will complicate efforts to contain them.

---

[3] *See generally* D. Geesaman, "Plutonium and the Energy Decision", *Bulletin of the Atomic Scientists* (September, 1971), and M. Willrich and T. Taylor, *Nuclear Theft: Risks and Safeguards* (1974). The fresh fuel now used in present-day reactors, the light-water reactors, is uranium. Unlike plutonium, uranium fuel is not extremely toxic, and it is not sufficiently rich in fissionable material (the uranium-235 isotope) to be fashioned into atomic bombs.

In an effort to suppress nuclear violence and coercion, to limit the spread of illicit nuclear weapons, and to encourage the needed perpetual social stability, the United States and other countries may have to undertake massive social engineering and to abrogate traditional civil liberties. The drastic nature of the nuclear threat is apt to elicit a drastic police response. Even these measures, however repressive, might in the end prove ineffective.[4]

B. Procedural History

In late 1973 the Atomic Energy Commission (AEC)[5] decided that it would prepare "a generic environmental impact statement covering all aspects of the full scale use of recycled plutonium in light water power reactors" and that a "decision on licensing the full scale use of mixed oxide[6] fuels in light water reactors will be made *after the NEPA environmental statement has been completed*" (emphasis added). Letter to J.G. Speth of Natural Resources Defense Counsel (NRDC) from S.H. Smiley, Deputy Director for Fuels and Materials, Directorate of Licensing, AEC, attached to the Reply Brief filed by NRDC, et al. in the Court below. The AEC formal

[4] The full statement, together with a list of signers, is reprinted in the January, 1976 Bulletin of the Atomic Scientists. And see J. Speth, A. Tamplin and T. Cochran, "Plutonium Recycle: The Fateful Step," Bulletin of the Atomic Scientists (November, 1974).

[5] The AEC was abolished and the Nuclear Regulatory Commission established by the Energy Reorganization Act of 1974, P.L. 93-438, 88 Stat. 1233 (1974).

[6] Plutonium is extracted from the radioactive waste produced by reactors, converted to an oxide, mixed with uranium oxide and formed into mixed oxide fuel pellets for use in fuel rods for light water nuclear reactors.

announcement of its intent to prepare this generic statement—called the Generic Environmental Statement on the Use of Mixed Oxide Fuel (GESMO)—was issued on February 12, 1974. 39 Fed. Reg. 5356. The Commission issued a draft of GESMO on August 21, 1974. 39 Fed. Reg. 30186. On August 7 and November 11, 1974, NRDC formally requested the Commission and the Regulatory Staff of the Commission to refrain from taking certain licensing actions with respect to plutonium recycle facilities until completion of the GESMO review. Jt. App. 87-93; Attachment C to Brief for NRDC, et al. in the Court below.

Draft GESMO did not discuss the problems of nuclear theft, terroism and sabotage.[7] That failure was severely criticized by, among others, the Council on Environmental Quality. Attachment C to Brief for NRDC, et al. in the Court below. On May 3, 1975, the Commission announced provisionally that (1) it would prepare an addendum to the draft GESMO evaluating safeguards alternatives and circulate it for comment; (2) any decision on wide-scale plutonium recycle should await completion of GESMO, including the safeguards addendum; (3) no additional uses of mixed oxide fuel in reactors should be approved except for experimental purposes; and (4) other fuel cycle activities should not be licensed where future safeguards would be foreclosed and where unnecessary "grandfathering" would occur, provided that licenses for experimental and/or technical feasibility purposes would be allowed. This was, in effect, the Commission's provisional response to NRDC's November 11, 1974, request.

[7] Measures designed to prevent these improper uses of plutonium are called "safeguards."

After the receipt of responses from the public, the Commission issued on November 11, 1975, the order which is the subject to this review. A-1 to A-33. The order was, in effect, the final response to the November 11, 1974, petition by NRDC to the Commission. In its order the Commission (1) decided to prepare the safeguards addendum to the GESMO but to proceed with issuance of the rest of the GESMO in final form prior to completion of the addendum; (2) to allow unlimited licensing of mixed oxide fuel use, transport and export of plutonium, and operation of existing plutonium fuel fabricating facilities; (3) to allow the Commission staff to complete its safety and environmental reviews on all plutonium recycle actions prior to completion of the GESMO without consideration of the issues covered by the GESMO, but only with consideration of local issues; (4) to allow hearings on proposed plutonium recycle activities if warranted after balancing two factors—(a) the extent to which early findings on local issue would be likely to retain their validity after completion of the GESMO review and (b) the possible effect on the public interest of an early, if not necessarily conclusive, resolution of local issues; and (5) to allow issuance of licenses for plutonium recycle facilities[8] after consideration of whether a NEPA cost-benefit analysis can justify the facility without primary reliance on Commission approval of plutonium recycle, whether substantial safeguards alternatives will be

[8] Fuel fabricating facilities and the portions of reprocessing plant facilities which convert separated plutonium into plutonium oxide could not be licensed until the Commission had issued draft regulations for improving safeguards and the facilities met these draft regulations.

foreclosed, and the effect of delay in approval of the activity on the public interest.

The Court of Appeals summarized the breadth of activities which were encompassed by these rules (A-49):

> It is important to note what is encompassed by the term "interim activity." The Commission will allow separation of plutonium and uranium from fuel wastes; it will allow reprocessing of the fuel into forms suitable for use; it will allow fabrication of mixed oxide fuel; it will permit use of mixed oxide fuel in presently existing light water reactors; it will license plant construction to achieve the foregoing steps; and it will permit the transportation, including international transportation, of mixed oxide fuel in its various processing stages. All of the foregoing activities will be allowed on a commercial-scale level. The order expressly states that "no limits will be placed on the number of light water reactors for which . . . authorization [to convert from use of uranium to plutonium] may be granted." (40 Fed. Reg. at 53062.) In addition, the order does not state that there will be any limits on the other recycle activities allowed in the period prior to the final decision on GESMO.

The November 11, 1975, order also established certain rules for the conduct of a hearing to be held on the GESMO when published in final form. The Commission had previously announced that it would hold a hearing on the GESMO either before or after its completion, and solicited views on the issues to be considered and the format and procedure for the hearing. 39 Fed. Reg. 43101. Despite the fact that the hearing on the GESMO is no more than a hearing on issues consolidated from several pending and prospective plutonium-

related proceedings for which adjudicatory hearings will be held, the Commission ruled on November 11, 1975, that the GESMO hearing would be, with limited exceptions, a legislative-type hearing. Moreover, the Commission ruled that this hearing would commence after completion of part of the GESMO but prior to completion of the entire GESMO—particularly the segment discussing safeguards against nuclear theft, terrorism, and sabotage. A-16 to A-18. On January 6, 1976 (41 Fed. Reg. 1133), the Commission described in considerable detail the GESMO hearing procedures and stated that in addition to preparation of the GESMO it also intended to promulgate regulations related to plutonium recycle, which regulations will also be considered in the GESMO hearings.

The Commission has also determined that the issues covered in the GESMO may not be raised in individual licensing proceedings. *In the Matter of Consumers Power Co.* (Big Rock Point), NRCI-75/8, CLI-75-10, p. 188. In that proceeding the Commission ruled that in deciding whether to allow use of a full load of plutonium fuel the licensing board should disregard all "generic matters properly treated in GESMO." *Id.* at 190. The scope of issues thereby excluded from consideration is enormous as disclosed by the draft GESMO Table of Contents (Attachment D to brief of NRDC, et al. in the Court below). Essentially the only issues upon which the individual licensing decisions would be based are purely site specific issues. Consideration of the risks of terrorism or sabotage directed at the plutonium on site or in transit, the health consequences from releases of the plutonium and the non-plutonium recycle alternatives to the proposed action, would be excluded.

Following issuance of the November 11, 1975, order, NRDC along with five other environmental groups and the State of New York separately filed petitions for review of that order.

C. The Court of Appeals Decision

The Court of Appeals overturned the Commission order only insofar as it authorized a final license decision *prior* to completion of the GESMO procedures (A-72):

> We express no opinion on the merits of the question of wide-scale use of mixed oxide fuel. That decision is one for the Commission initially, and is not before the court. We do not conclude that the Commission must refrain from all action until the final decision on GESMO; rather, the Commission can process license applications, rule on the scope of hearings and applications for intervention, and even proceed to hold individual hearings to gather relevant data on individual site factors. All this may be undertaken before the final decision on wide-scale use, and the Commission may fully employ the bifurcated procedures which we have considered above. However, the Commission may not grant or deny applications for commercial licenses to construct or operate plutonium-related separation or reprocessing facilities, nor may it license commercial scale transportation or use of plutonium and uranium mixed oxide fuel, until the GESMO and the GESMO supplement have been issued in final form and until the Commission has made its final decision on wide-scale use of mixed oxide fuel.

With respect to reviewability of the November 11 order, the Court of Appeals held that the order laid down rules of general applicability which established

the standards for making decisions on applications for permits to construct or operate plutonium recycle facilities and to use, transport or export plutonium fuel. Pertinently, the Commission's November 11 rules determined that licenses could be issued before completion of the GESMO review based upon environmental reviews which *"need not address the environmental issues being treated in the GESMO study."* A-48. Accordingly, the Court of Appeals concluded that review was clearly appropriate in light of the fact that the November 11 order was the culmination of an extended rulemaking proceeding which established specific legal rights. A-51 to A-55.

The Court of Appeals began its review of the November 11 order by stressing the importance of the NEPA review as the process by which the Commission will determine whether or not to allow the new technology to be commercialized. It concluded, without contradiction from any party, that "NEPA clearly required the GESMO study". A-65. It further found that draft GESMO "is a legally insufficient environmental impact statement" because it "did not fully address alternatives to plutonium recycle or the special problems of theft, diversion and sabotage." A-65.

The Court of Appeals closely analyzed the Commission's so-called "interim" licensing criteria. Pursuant to the criteria decisions could be made on an unlimited number of full-term applications to construct and operate commercial-scale plutonium recycle facilities and to use, transport and export plutonium fuel. The Court of Appeals concluded that "there is little but the word 'interim' itself to distinguish the scope of activity which will be allowed from the scope of activity which" (A-67 to A-68) the Commission would allow if GESMO were completed.

The Court of Appeals also found that the so-called "interim" licensing criteria were "at best vague and at worst disingenuous." A-66. As framed, the criteria allowed the Commission to proceed with commercialization of plutonium-recycle even though the decision would severely prejudice the ultimate decision, even though the Commission could not determine whether important safeguards alternatives had been foreclosed, and even though reliance would be placed on such totally discredited excuses for non-compliance with NEPA as the alleged cost of delay. A-66 to A-67. The Court of Appeals recognized that because of the magnitude of the decision involved in commercialization of the plutonium recycle technology, a decision on any commercialization must be preceded by the required NEPA analysis (A-69 to A-70):

> Here the activity which will be permitted involves construction of nuclear separation and reprocessing facilities, conversion of light water nuclear reactors to use of mixed oxide fuel, and the implementation of "interim" safeguards for the transportation of a deadly and highly radio-toxic nuclear material. Each of these steps will tip the scale towards a favorable final decision on wide-scale use. Each of these steps will move the nation towards the use of a hazardous nuclear fuel the implications of which are not fully understood. We accordingly conclude that the order below constitutes major federal action which has

not been accompanied by an adequate NEPA analysis.

* * * *

We conclude that the interim licensing envisioned by the Commission's decision would indeed result in such a substantial further commitment of resources that the final decision on the costs and benefits of the public health and safety and environmental aspects of wide-scale use of mixed oxide fuel would be significantly affected and that generic determinations of these issues, and particularly of safeguards alternatives, could be effectively foreclosed. The Commission's conclusion to the contrary is clearly erroneous and is not supported by the record.

Finally, the Court of Appeals clearly rejected the asesrtion that any actions taken on individual license applications would be preceded by adequate environmental reviews. The Court found that although the Commission did intend to conduct an environmental review for each application that review would be inherently inadequate because review by the Commission Staff would be limited to "those questions not being addresed in GESMO" and the individual impact statement *"need not address the environmental issues being treated in the GESMO study."* (A-48.) These fundamental defects in the environmental review proposed for individual facilities are based upon the Commission's own decisions on the interrelationship between the scope of the GESMO review and the scope of the review for individual facilities (A-48, fn. 8):

> . . . This position was set forth clearly by the Commission's decision *In the Matter of Consumers Power Company* (Big Rock Point Nuclear Plant) Docket No. 50-155, NRCI-75/8, CLI-75-10, p. 188. "The scope of the NEPA review in this case should, of course, be tailored to the possible environmental impact resulting from increasing the amount of plutonium in this one reactor . . . . Discussion of possible adverse environmental effects and alternatives to the proposed action can be limited aecordingly. The statement need not, for example, discuss alternatives to plutonium recycle, and other generic matters properly treated in GESMO." *Id.* at 190.

The Commission's limitation on the scope of the NEPA review which would be allowed for individual applications formed the basis for the Court of Appeals conclusions (A-66, A-71):

> Because the impact statements which will accompany fuel use and transportation will not consider GESMO issues, those statements cannot be adequate under NEPA.
>
> * * *
>
> The Commission has chosen to address generic issues in a broad-scale inquiry in order to comply with the NEPA. However, by so doing, it cannot be allowed to circumvent the mandates of NEPA by granting interim licenses on the basis of records which exclude the generic aspects.

Subsequent to this Court's decision in *Kleppe* v. *Sierra Club*, — U.S. —, 96 S.Ct. 2718 (1976), the Court of Appeals was asked to rehear the case with a suggestion for rehearing *in banc*. The Court unanimously rejected the petitions and suggestions. Contrary to petitioners' assertions, the Court of Appeals found in *Kleppe* additional support for its decision. In *Kleppe* this Court concluded that when a programmatic impact statement is prepared individual actions may not proceed unless the impact statements pre-

pared for such actions are legally sufficient and unless the individual actions are essentially unrelated to the programmatic level activity. The Court of Appeals here emphasized that in this case (A-76):

> . . . interim impact statements drafted in accordance with presently existing Commission rules and precedent would necessarily result in impact analyses inadequate under NEPA.

The Court of Appeals further found that because the Commission proposed to license commercial-scale activities prior to completion of the GESMO review and because that licensing involves the crucial first step in commercialization of a new technology, the individual licensing decisions are (A-76):

> . . . clearly tied to the anticipated wide-scale use and would commit substantial resources to the mixed oxide fuel technology.

The Court of Appeals then concluded (A-76 to A-77):

> The commercial use of plutonium raises fundamental environmental questions which require a scrupulously deliberate and complete assessment of the hazards presented to our society. The statutes enacted by Congress will permit nothing less. NEPA was intended to insure that an agency make a thorough inquiry into significant environmental effects and potential hazards before embracing a major new technology. Until the GESMO supplement is completed, the Commission cannot adequately assess the consequences of its action.

REASONS FOR NOT GRANTING THE WRITS

1. The Decision Below Is Fully Consistent With Holdings of This Court.

The Court of Appeals held that the Commission's November 11, 1975, order violated NEPA because it authorized the commercialization of a new and dangerous technology prior to the required NEPA review. This Court and other circuits have uniformly held that in such a case NEPA requires completion of the environmental review prior to making any commercialization decisions. The decision below is fully consistent with these holdings. Certiorari is clearly not warranted.

This Court has held that NEPA compels a federal agency where Section 102 applies, to provide a final environmental impact statement at the time it makes a proposal and to consider that statement at the relevant agency hearing. *Aberdeen & Rockfish R. Co.* v. *SCRAP*, 422 U.S. 289, 320 (1975). This Court has further held that each discrete agency action meeting the threshold test of NEPA must comply with the procedures of NEPA. *Aberdeen & Rockfish R. Co., supra,* at 318-19. Finally, this Court has held that pending completion of a programmatic review, no activities covered by the programmatic review may be authorized unless the environmental analysis for each activity is adequate and unless the activity is separable from the program itself. *Kleppe* v. *Sierra Club, supra,* 96 S.Ct. at 2729 n. 16, 2733 n. 26 (1976).

The Court of Appeals in this case followed such binding and persuasive precedent to hold that the Commission, faced with the need to decide whether to commence a new national energy program, could not authorize the first commercialization steps unless pre-

ceded by an adequate programmatic NEPA review. *Kleppe* v. *Sierra Club, supra,* 96 S.Ct. at 2726; *Scientists Institute for Pub. Info. Inc.* v. *Atomic Energy Com'n,* 481 F.2d 1079, 1093-94 (D.C. Cir. 1973). This application of NEPA is particularly appropriate here because of the unique nature of the plutonium risk. Unlike individual coal leases under the national coal leasing program, which this Court noted with approval were preceded by preparation of a national programmatic impact statement (*Kleppe, supra*), the environmental consequences of approving individual plutonium recycle activities are not separable from the environmental consequences being addressed in GESMO. For instance, once the United States approves any commercial plutonium recycle, it will legitimize the technology and provide nations which have peaceful and military objectives an excuse to begin to separate plutonium, thus putting nuclear weapons within easy reach for those nations. In addition, because of the long-lived toxicity of plutonium (a 24,000 year half-life), the accidental release of plutonium from a single commercial facility would have long-term, irreversible and wide-spread consequences. Finally, even in a recycle economy, facilities of the size proposed for construction and operation during the "interim" period would represent as much as 10%-20% of the total contemplated industry.[9]

In rejecting arguments that "interim" licenses should be given to commercial recycle facilities, the

[9] Although petitioners assert that approval of plutonium recycle activities is not tied to a national plutonium recycle program, their arguments on the national importance of this case put the lie to that assertion. Clearly petitioners see approval of plutonium recycle activities as a crucial part of a national plutonium recycle program. Approving those activities is only warranted, in petitioners' own views, as a first commitment to the plutonium technology whose wisdom is the subject of the GESMO review.

Court of Appeals found that approvals of the first commercial-scale plutonium recycle activities were inherently commitments to a plutonium recycle program and that the Commission violated NEPA when it excluded from the environmental review for each activity the programmatic and generic issues covered in GESMO. A-70. Petitioners assert that it was premature for the Court of Appeals to reach these conclusions because the November 11 order was not intended to resolve those questions but rather, through application of the interim licensing eligibility criteria, to resolve those questions on a case-by-case basis.

In fact, the Commission in its November 11 order reached conclusions which effectively resolved all the factors contained in the eligibility criteria.[10] Thus the Court of Appeals concluded (A-69):

> . . . the order below gives a green light for the industry to commence planning and implementa-

[10] In that order the Commission concluded that authorization of any plutonium recycle activity would not foreclose alternatives and would not tilt the cost/benefit balance in the final GESMO (A-22, A-23, A-24):

> . . . interim licensing of a particular activity would not foreclose for that activity significant health and safety or environmental alternatives that may result from the final decision on wide-scale use of mixed oxide fuel.
>
> • • •
>
> . . . interim licensing of particular projects prior to completion of the generic environmental impact statement would not result in the overlooking of any cumulative health and safety or environmental impacts or in the foreclosure of alternatives to other projects that could only be addressed in the generic environmental statement.
>
> • • •
>
> . . . interim licensing is not likely to result in such a substantial further commitment of resources that the final decision on the costs and benefits of the public health and safety and environmental aspects of wide-scale use of mixed oxide fuel

tion of a second generation of atomic fuel technology.

Similarly, the Commission also concluded in its November 11 order that the environmental review for any plutonium recycle activity would be adequate even though it excluded all GESMO issues [11] (A-22):

> The Commission believes that any public health and safety and environmental issues associated with interim licensing can be addressed adequately under the Commission's regulations within the context of the reviews of the individual license applications.

But, as the Court of Appeals found, because GESMO is in part a generic review of issues common to all individual plutonium recycle activities, exclusion of all GESMO issues from the individual environmental review for those activities necessarily excludes issues which are crucial to review. One of the excluded issues, the problem of terrorism, theft and sabotage, is

---

would be significantly affected or that generic determinations on such aspects would be foreclosed.

• • •

. . . any interim licensing is highly unlikely to result in such a substantial further commitment of resources that the decision on the costs and benefits of safeguards measures appropriate for widescale use of mixed oxide fuel would be significantly affected or that generic safeguards determinations would be foreclosed.

Because these conclusions covered the principal factors contained in the so-called "interim" licensing criteria, the conclusions were the definitive resolution by the Commission of the factors prior to consideration of them by any licensing board and guaranteed that a decision would be reached on any plutonium recycle activity for which an application was filed.

[11] *In the Matter of Consumers Power Co.* (Big Rock Point), *supra*.

so crucial to the decision on whether to license a plutonium recycle facility that CEQ concluded that resolution of that issue might well determine whether or not plutonium recycle facilities should be licensed and that any such licensing should await resolution of the issue (Letter from Russell Peterson, Chairman, CEQ, to Wiliam Anders, Chairman, NRC, included in Attachment C to brief of NRDC, et al. in the court below):

> The potential impacts of the diversion and illicit use of special nuclear materials are well recognized. This threat is so grave that it could determine the acceptability of plutonium recycle as a viable component of this Nation's nuclear electric power system. Thus, we believe that the NRC, the Executive Branch, the Congress, and the American people should have the benefit of a full discussion of the diversion and safeguards problem, its impacts, and potential mitigating measures, before any final decisions are made on plutonium recycle.

2. The Commission Order Was Ripe for Judicial Review.

Several petitioners argue that the case should be taken by the Court because the decision below conflicts with Supreme Court precedent regarding timing of judicial review. But as the Court of Appeals found, the Commission's November 11 Order was the culmination of a rulemaking proceeding by which it promulgated rules implementing NEPA and the Atomic Energy Act. A-53 to A-55. The order sets standards and enunciates criteria for determining whether and how interim licensing will be permitted. As the Court held, the order is reviewable because the agency record was complete, the "NEPA issues are clear," and "the decision to proceed to commercial interim licensing has an immediate and significant impact on the Commis-

sion's future course of action." A-54. In these circumstances the Court properly took jurisdiction in reliance upon Supreme Court cases. *Port of Boston Marine Terminal Ass'n.* v. *Rederiak-tiebolaget Transatlantic,* 400 U.S. 62 (1970); *United States* v. *Storer Broadcasting Co.,* 351 U.S. 192 (1956); *Toilet Goods Ass'n* v. *Gardner,* 387 U.S. 158 (1967); and *Abbott Laboratortories* v. *Gardner,* 387 U.S. 136 (1967). Particularly apt is *Aberdeen & Rockfish R. Co.* v. *SCRAP, supra,* where the Court in similar circumstances held that the decision made on the termination of one discrete proceeding was ripe for review of NEPA procedures irrespective of other parallel proceedings (*Aberdeen & Rockfish R. Co., supra,* 95 S.Ct. at 2355):

> NEPA does create a discrete procedural obligation on government agencies to give written consideration of environmental issues in connection with certain major federal actions and a right of action in adversely affected parties to enforce that obligation. When agency or departmental consideration of environmental factors in connection with that "federal action" is complete, notions of finality and exhaustion do not stand in the way of judicial review of the adequacy of such consideration, even though other aspects of the rate increase are not ripe for review.

The fundamental advantage of a generic review such as GESMO is to avoid the multiple litigation associated with trying essentially the same issue in many proceedings. Petitioners would destroy that advantage by requiring that in every proceeding for consideration of issuance of a construction permit or an operating license for a plutonium recycle activity the NRC and ultimately a court determine whether a decision on the commercial-scale activity must be preceded by comple-

tion of the GESMO and whether the environmental review for the activity is deficient because it excludes all of the GESMO issues. Clearly resolution of those questions was ripe for judicial review as soon as the NRC issued its November 11 order. By that order the Commission recommended that commercialization of plutonium recycle proceed in the absence of the GESMO review based upon impact statements that were inadequate because they excluded GESMO issues. As this Court stated in *Kleppe, supra,* 96 S.Ct. at 2729 fn 15:

> . . . the time at which a court enters the process is when the report or recommendation on the proposal is made, and someone protests either the absence or the adequacy of the final impact statement.

3. The Court of Appeals Decision Fosters the National Interest.

It is extremely significant that although petitioners assert the national need for early decisions on plutonium recycle activities, the Commission and the Solicitor General conclude that this case does not have sufficient national importance to warrant this Court taking certiorari.[12]

The crucial focus in deciding the national interest is the legislation enacted by Congress which governs the issue involved. The relevant national interest involved

---

[12] President Carter stated in a major energy policy statement during his campaign that the United States "should withhold authority for domestic commercial reprocessing until the need for, the economics and the safety of this technology is clearly demonstrated." Remarks by Governor Carter, San Diego, California, September 25, 1976. The decision of the Court of Appeals implements that policy.

here is spelled out in NEPA and was articulated by this Court in *Kleppe, supra,* 96 S.Ct. at 2730:

> NEPA announced a national policy of environmental protection and placed a responsibility upon the Federal Government to further specific environmental goals by "all practicable means, consistent with other essential considerations of national policy." NEPA § 101(b), 42 U.S.C. § 4331 (b). Section 102(2)(C) is one of the "action-forcing" provisions intended as a directive to "all agecies to assure consideration of the environmental impact of their action in decision-making." [citation omitted]

A principal purpose of the GESMO review is to determine whether the real and substantial risks inherent in separating plutonium and allowing it to become a commercial product are outweighed by the alleged saving in nuclear fuel. It is clearly premature to resolve that question prior to completion of GESMO. What is of utmost importance is that no precipitous step be taken which will tend to foreclose options. The Court of Appeals assures that result by allowing continuation of the licensing process but preventing any decisions on plutonium recycle activities until after completion of the GESMO review.

CONCLUSION

For the reasons set forth above, the Petitions for Writs of Certiorari should be denied.[13]

Respectfully submitted,

ANTHONY Z. ROISMAN
ROISMAN, KESSLER & CASHDAN
1025 15th Street, N.W.
Washington, D. C. 20005

Attorney for Respondents Natural Resources Defense Council, Inc., et al.

ROSS SANDLER

Attorney for Respondents Natural Resources Defense Council, Inc., et al.

Mailing Address:

NATURAL RESOURCES DEFENSE COUNCIL, INC.
15 West 44th Street
New York, New York 10036

March 9, 1977

[13] The suggestion of Commonwealth Edison and the Commission that summary reversal is warranted should also be rejected. As indicated above, respondents are of the view that the decision below conforms to prior Supreme Court cases, not conflicts with them. The rarely-used remedy of summary reversal is inapplicable where one cannot say that the decision below is inevitably governed by the prior Supreme Court decision and is hence clearly erroneous. See *Gibson* v. *Thompson,* 355 U.S. 18 (1957) (Harlan, J., dissenting); *Colorado Springs Amusements, Ltd.* v. *Rizzo,* — U.S. —, 96 S.Ct. 3228 (1976) (Brennan, J., dissenting). Summary reversal cases relied upon by Commonwealth Edison and the Commission are wholly inapposite. One case involved a supervening amendment to the statute, a consideration not present here. *Coleman* v. *Conservation Society of Southern Vermont,* 423 U.S. 809 (1975). The other case was based on a clear error of law and not upon a disputed claim of conflict with a prior holding of the Supreme Court; it appears to have been cited merely because the Commission was involved. *Northern Indiana Public Service Co.* v. *Porter County Chapter of the Izaak Walton League,* 423 U.S. 12 (1975).